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Submitted via email to: e-OED@dol.gov

Office of Exemption Determinations
Employee Benefit Security Administration (Attention: D-11712)
U.S. Department of Labor
200 Constitution Avenue, NW., Suite 400
Washington, DC 20210

Subject: Comments Regarding the Proposed Best Interest Contract
Exemption, ZRIN 1210-ZA25

Dear Sir or Madam:

My interest in submitting these comments¹ is to address certain issues relating to the notice requirement contained in the Proposed Best Interest Contract Exemption (the "Proposed Exemption").² In general, the Proposed Exemption permits Financial Institutions³ and their Advisers⁴ to receive certain types of compensation for their services provided specific conditions are satisfied. One of

¹ The opinions expressed in this letter are my own and do not reflect the opinions of any other person, organization or agency. Although I submit these comments as a private practitioner, I spent more than 22 years as a professional in the Employee Benefits Security Administration (EBSA's) Office of Enforcement.

² U.S. Department of Labor, Employee Benefits Security Administration, 80 Fed. Reg. 21987 (proposed April 20, 2015).

³ In general, Section VIII of the Proposed Exemption defines the term "Financial Institution" to mean the entity that employs an Adviser or retains the individual as an independent contractor, agent or registered representative and that is: (1) registered as an investment adviser under the Investment Advisers Act of 1940; (2) a bank or similar financial institution; (3) an insurance company; or (4) a registered broker-dealer.

⁴ In general, Section VIII of the Proposed Exemption defines an "Adviser" as an individual who: (1) is a fiduciary of a Plan or IRA solely by reason of the provision of investment advice as determined under ERISA, the Code and the regulations; (2) is an employee, independent contractor, agent, or registered representative of a Financial Institution; and (3) satisfies the applicable federal and state regulatory and licensing requirements of the insurance, banking, and securities laws.

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those conditions is a requirement that the Financial Institutions submit a notice to the Department of their intent to rely on the relief offered by the Exemption. The following comments recommend changes to the notice requirement for the purpose of increasing efficiency for both the Financial Institutions and EBSA.

I. The Proposed Exemption Requires That Financial Institutions Send a Notice as a Condition for Relief

Section V(a) of the Proposed Exemption requires Financial Institutions to notify the Department of Labor before they receive prohibited compensation in reliance on the relief offered by the Exemption. Specifically, Section V of the Proposed Exemption captioned “EBSA Disclosure” states that

Before receiving compensation in reliance on the exemption in Section I, the Financial Institution notifies the Department of Labor of the intention to rely on this class exemption. The notice will remain in effect until revoked in writing by the Financial Institution. The notice need not identify any Plan or IRA.

In addition to the requirement set forth in the text of the exemption, the preamble states that: “[t]he Department envisions accepting the notice via e-mail and regular mail.” The preamble further explains that

This is a notice provision only and does not require any approval or finding by the Department that the Financial Institution is eligible for the exemption. Once a Financial Institution has sent the notice, it can immediately begin to rely on the exemption provided the conditions are satisfied.

II. Comments Regarding the Notice Requirement

As the Department proceeds to finalize the notice requirement, the following recommendations are submitted for consideration:

A. Identifying the EBSA Office That Will Receive the Notices

Although the Proposed Exemption indicates that a notice of intent to rely on the exemption must be submitted to the Department before relying on the Exemption, it does not indicate which office within EBSA will receive the notice.

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Presumably, the principal way in which the notice submission is of particular value to the Department is to provide EBSA with data for the creation of a database that investigators will use in selecting investigative targets to evaluate compliance with the terms of the Exemption. If that is one of the Department's goals, the notices should be submitted directly to EBSA's Office of Enforcement (OE).

In addition, if the notices are to be sent to OE, only those notices relating to ERISA plans should be submitted because EBSA has no enforcement jurisdiction over IRAs. The submission of notices that relate to both plans and IRAs will lessen the data's enforcement value because of the difficulty in culling out the entities subject to EBSA's investigative jurisdiction. This is particularly likely because the Proposed Exemption provides that the notice need not identify any specific plan or IRA. Notices relating to IRAs could be sent to a different office, possibly the Internal Revenue Service, in light of the fact that IRS has enforcement jurisdiction over IRAs.

B. Inefficiencies Related to Processing Postal Mail and Email

As a general matter, the physical handling and processing of postal mail is extremely inefficient. Thus, requiring that the notice be submitted by mail could involve processing hundreds, if not thousands, of pieces of mail and will result in diverting valuable resources from more important duties. Even the use of email for the notices will be comparatively inefficient. Accordingly, the Exemption, when it is published in the Federal Register, should employ an online submission system and specifically include an identified web address that will go live when the Exemption is finalized.

A key advantage of an online system is that it will provide immediate notification to the Department and allow the submitter to print and save a copy of an acknowledgement that the Department received the submission. Having such a system would be particularly advantageous to Financial Institutions making submissions because it would be easy and immediate and provide clear evidentiary proof that this specific condition of the Exemption had been satisfied in the event of a compliance audit. This approach is similar to that currently used in connection with the Section 408(b)(2) online system and much of the basic structure of that system could be readily adapted to the notice requirement under the Proposed Exemption.

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In addition, the online submission system should be designed to permit immediate withdrawal of the notice and printable confirmations that the withdrawal was effective. Thus, to the extent the notices are used for investigative targeting and compliance evaluation, Financial Institutions would be able to withdraw the notices when they are no longer applicable to avoid the possibility of an unnecessary compliance audit.

C. Adequate Information Needed to Identify the Submitter

While the Department understandably may wish to keep the contents of the required notice to a minimum and thereby decrease the burden on submitters, it is nevertheless essential that sufficient information be provided to accurately identify the Financial Institution making the submission. In this regard, an online notice submission system has many advantages, not the least of which is that mandatory identification fields on the form can be programmed, thereby providing submitters a user-friendly guide to what is required. These mandatory fields will also assist EBSA in compiling and maintaining its database electronically and reduce clerical errors and other entry mistakes.

The online submission form should contain, at a minimum, the following: (1) Financial Institution's registered name; (2) any alternative names under which the institution conducts business; (3) the headquarters address or branch office address, as applicable; and (4) the name(s) of the contact person(s) responsible for complying with the Exemption and telephone number(s) for those person(s). In addition, the Department should require two other pieces of information (if applicable): (1) the submitter's Federal Employer Identification Number (EIN) issued by the IRS and (2) the submitter's CRD (Central Registration Depository) number assigned to broker-dealers registered with FINRA.

The EIN would be particularly helpful to EBSA because it would allow the agency to link the notice submissions to its internal Form 5500 database that includes the Schedule C for service providers. In addition, by requiring the CRD number, EBSA will be able to more effectively link the notice submissions with other databases, if available, such as the Investment Adviser Registration Database and BrokerCheck. In any case, these options would improve enforcement efficiency and thereby potentially save submitters the additional costs of responding to questions resulting from an inefficient submission system. In addition, the more efficient and effective use of available databases for enforcement will save valuable resources for the Government and save

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businesses the costs associated with investigations resulting from a less effective investigative targeting system.

III. Conclusion

The efficient implementation of the Proposed Exemption's notification requirement is in EBSA's best interest as well as the best interests of the Financial Institutions that will use the system. Accordingly, to ensure that notifications are properly received, compiled and managed, the Department should implement an online submission process. The recommended changes to the notice requirement will (1) help to ensure accuracy in the submission process, (2) facilitate handling and management of the submissions, (3) expedite the creation of a useable database for enforcement purposes, and (4) ease the burden of the financial industry in making the submissions while simultaneously providing documentation of compliance with the notice condition of the Exemption.

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Thank you for the opportunity to comment on this very important Proposed Exemption. If you have any questions, please do not hesitate to contact me at (571) 766-6406.

Sincerely,



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